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No. 687

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., *Petitioner*,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 627

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., *Petitioner,*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The four judges who made the rulings on this matter in the two lower courts were unanimous in their decision. The Court of Appeals, in an opinion written by Chief Judge Hastings, affirmed the decision of Chief Judge Campbell in the District Court. Judge Hastings' opinion adopted by reference a portion of the opinion of the District Court, and we are therefore attaching a copy of the latter in the appendix to this brief, at pages A-1 *et seq.* It is reported at 224 F. Supp. 903. The opinion of the Court of Appeals is reported at 333 F. 2d 705 and is reproduced in the appendix to the petition of The Great Atlantic & Pacific Tea Company, Inc. ("A & P"). The stipulation of facts is set out as an appendix to the opinion of the Court of Appeals (Pet. 39 *et seq.*).

Contrary to A & P's assertions in its petition for a writ of certiorari, there was no proof in this case that the two-day delay of the shipment of plums resulted in a

scarcity of plums in any A & P stores. The lower courts held that A & P's assertions, repeated in its petition here, of an alleged scarcity and subsequent surplus of plums in its stores were neither stipulated nor supported by the stipulation of facts. Moreover, A & P did not find it necessary to buy any additional plums at the wholesale market to supply to its stores during the delay. It was stipulated that the plums in the shipment were not damaged, had not deteriorated, and were sold in the A & P stores. The retail price level remained steady and the contemporary decline in the price of plums at the wholesale market, where A & P does not operate, had no effect on A & P. No loss of any kind was incurred by A & P. An award to A & P, on the facts of this case, would have been an unjust enrichment.

The lower courts emphasized that the facts of this particular case showed no loss or injury to A & P. The courts also emphasized that in dismissing the complaint they were following accepted basic legal principles and applying them to the facts. The District Court, after considering both the facts and the legal principles, concluded that "From the facts in evidence I cannot thus depart from accepted traditional principles of the law of damages" (App. A-12). The Court of Appeals, quoting another circuit regarding the effect of delay in transportation, noted that "Each case must be governed by its own facts" (Pet. 33). The Court of Appeals also stated: "The district court, in reaching its decision, correctly considered and applied the applicable law" (Pet. 38). There is no conflict with decisions of this Court or of the Courts of Appeals, and the petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

We regret the necessity for noting that A & P's petition for certiorari does not correctly state the facts of this case.

On page after page A & P states or infers that the delay in delivery of the shipment of plums involved in this case resulted in a "scarcity" of plums in A & P's retail stores on Monday, June 11, and a "surplus" on Wednesday, June 13 (Pet. 3, 6-7, 7, 8, 9, 11, 13). For example, A & P says that "The common sense result of the delay was, therefore, a scarcity of plums in some stores on Monday and a surplus in some stores on Wednesday" (Pet. 7). It is on the basis of such a supposed factual situation that A & P argues that it was damaged and seeks further review of this case. Referring to an alleged lack of plums in the stores to satisfy the needs of the stores and consumers, A & P says: "This injury to A & P's operation is the realistic 'fact of damage' in this case" (Pet. 3). But the actual situation is that no such facts were stipulated or otherwise introduced into the record.

Both of the lower courts considered A & P's assertions, in its briefs, of such claimed facts. Both courts held that A & P's assertions in this respect had not been proved. There was no showing that any A & P store either lacked sufficient plums for its needs, or had a surplus of plums, and no indication that consumers were affected in any way. The facts claimed by A & P were not among the facts stated in the stipulation, and the stipulation, together with a bill of lading, constituted the only evidence in this case. The facts that were stipulated do not support the assertions repeated by A & P here.

The District Court reviewed the facts which were presented by the stipulation and then stated in part as follows:

> "With this built-in flexibility, there is no showing that A & P had fewer plums for sale in its stores on Monday than it had intended in advance or that it had more plums on Wednesday." (App. A-8)

Chief Judge Campbell further noted that "A & P did not find it necessary to purchase plums on the wholesale market to supply its stores for Monday." He found that "there was no such rigidity of operations as A & P implies in its brief" (App. A-8).* He then stated: "From the facts before me, including the stipulated 'usual practice' of plaintiff, I cannot assume, as plaintiff suggests, that A & P had no plums to satisfy customer demands on June 11th and that therefore A & P lost profits" (App. A-8).

The Court of Appeals, at A & P's request, reviewed the findings in the light of the evidence. It quoted part of the above excerpts from the District Court's findings of fact

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* The stipulation included the following:

"In the New York Metropolitan area and in other metropolitan centers, pursuant to instructions from A & P, there is a routine practice for the carriers delivering cars of produce to place such cars on the public inspection tracks for inspection by A & P personnel. Thereafter, when a car is accepted by A & P, an order is given to the carrier to move such car to an A & P private siding for unloading. Customarily such car is delivered to the A & P private siding on the day on which it is inspected and accepted by A & P personnel at the public inspection tracks. From 12 to 24 hours may elapse from the time such car is placed on the public inspection tracks until it is delivered to the A & P private siding. At times A & P will arrange for immediate unloading of such cars of produce into trucks at the public inspection tracks for direct delivery to retail stores. On occasion, A & P may issue diversion orders to move a car from the public inspection tracks to some other city. On rare occasions A & P may allow a car to remain at the public inspection tracks after acceptance for a day or two before ordering the carriers to move the car to the A & P private siding. Cars are customarily unloaded by A & P promptly after they are delivered by the carrier to an A & P private siding. However, a car may remain at the A & P private siding from two hours to (on very rare occasions) 55 hours before it is released by A & P to the railroad." (Stip. par. 13; Pet. 45).

and noted that A & P was contending that the findings were erroneous (Pet. 35-36). The Court of Appeals, however, found no merit in A & P's contention that it should assume or find the existence of facts different from the facts found in the trial court.

Nowhere in its petition does A & P inform the Court that what it is stating to be the facts of this case regarding a supposed scarcity ("the lack of a sufficient quantity of perishables to satisfy the needs of the stores and consumers" (Pet. 3)) and a supposed surplus of plums in its stores were merely its own assertions in its briefs to the lower courts, and that those courts have found that these factual assertions lacked proof in the record. At pages 10 and 11 of the petition, A & P quotes what appears to be a paragraph from the opinion of the Court of Appeals, with asterisks which might be understood to indicate the omission of only part of a sentence.* The part of the opinion so omitted by A & P, however, includes the following statement by the Court of Appeals:

> "It [the District Court] further found, 'From the facts before me, including the stipulated "usual practice" of plaintiff, I cannot assume, as plaintiff suggests, that A & P had no plums to satisfy customer demands on June 11th and that therefore A & P lost profits.' *Id.* at 906." (Pet. 35)

By claiming "facts" which were not in evidence and which were expressly found to have been unproved, A & P is asking this Court to review and declare the legal principles that might be applicable to a case different from the present one. And A & P does so without even mentioning

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* While A & P's page reference at the end of the quotation is to page 36 of its appendix, the quotation begins with an excerpt from page 34.

that both lower courts found that the proved facts were different from those now asserted here.

The proved facts showed no loss, damage or injury to A & P in this case.

This shipment of plums from California to New York City was delivered to A & P two days beyond the usual eight-day transportation period, but the delay, although unreasonable and unexcused, was stipulated to have been "not intentional" (Stip. par. 4; Pet. 40). A & P conceded by stipulation that "There was no physical damage to or deterioration of the produce" (Stip. par 9; Pet. 41). There is no claim that any of the plums were spoiled. They were "sold at retail" (Stip. par. 5; Pet. 41).

A & P's daily price lists for its retail stores in the New York City area showed identical prices for such plums on each day of the week in question (Stip. par. 12; Pet. 42-43). The effect of the two-day delay was that the plums from this shipment were available for sale on Wednesday instead of on Monday and not that sales were made for a lower price. The District Court made a finding of fact (approved by the Court of Appeals) that "there was no physical damage to or deterioration of the plums which were merely sold by A & P at identical retail prices on Wednesday instead of Monday" (App. A-5).*

By this suit, A & P seeks to be paid an amount equal to the amount by which the price of plums declined on the wholesale market during the delay. While a wholesale market for produce exists at New York City and the prices

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* A & P's objection to the latter part of this finding of fact was reviewed and held by the Court of Appeals to be without merit. The court stated: "It is our judgment that this finding was the only reasonable one which the stipulation and evidence would permit the district court to make" (Pet. 37).

on that wholesale market fluctuate up or down, the shipment here involved had no relation to that wholesale market. "A & P does not sell on the wholesale market" (Stip. par. 6; Pet. 41). "The produce * * * was intended for sale and sold at retail in A & P stores in the New York City area and was not sold at wholesale" (Stip. par. 5; Pet. 41). During the month in which this shipment was transported and the contents sold by A & P, the prices on A & P's daily price lists in the New York City area for plums of this kind "did not change as frequently as the wholesale market prices, and did not move up or down in relation to changes in the wholesale market prices during that period" (Stip. par. 12; Pet. 42-43). "The retail prices [of produce in general] as shown in these price lists issued by A & P do not change as frequently as the wholesale market prices and often do not move up or down in relation to changes in the wholesale market prices" (Stip. par. 14; Pet. 45).

Despite the lack of relationship between the shipment here involved and the wholesale market or the fluctuations of prices at that market, it is stipulated that

> "Plaintiff bases its claim for damages in this action *solely* on delay in the transportation and delivery of the produce and the decline in *wholesale* market price during the period of such delay, as set forth in paragraph 5 hereof." (Stip. par. 9; Pet. 41-42; emphasis added)

A & P makes no claim that the decline in wholesale price caused a loss to it or in any way affected its profits. But if, having sold the plums at retail, A & P were then to be enabled to receive the amount by which the wholesale price had declined, A & P would enhance its profits. A & P states that its profit margin is a fraction of a cent on sales of produce items (Pet. 4). The $740 sought on this shipment of 1,000 crates would be an added amount for A & P

of four cents for a dozen plums (Stip. pars. 10 and 13; Pet. 42 and 44). If it could obtain this *additional* amount of four cents for each dozen plums, it would multiply its profits several fold. And, although this case concerns but one shipment, A & P is making thousands of such claims against various carriers (Pet. 15, 28). On its theory of recovery without proof of damage, wholesale market price decline during a delay in transportation would become A & P's good fortune, enabling it to receive more in cases of delay than it would have received had there been no delay.

In this case the District Court's findings of facts, supported by the stipulation and approved by the Court of Appeals, showed that (1) there was no proof of a lack or surplus of plums in any A & P stores on any day as a result of this delay; (2) the plums were sold by A & P at the same prices at which A & P would have sold them if there had been no delay; and (3) the decline in prices on the separate wholesale market did not affect A & P's operations or profits.

The basic finding here, on the facts of this case, was expressed by the District Court as follows:

> "I find that A & P had shown no actual loss, damage or injury and therefore is not entitled to recovery under the Carmack Amendment. *Illinois Central Railroad Co.* v. *Crail,* 281 U.S. 57, 63, 50 S.Ct. 180, 74 L.Ed. 699. Neither is plaintiff entitled to recover under the traditional common law concept of damages for, as Mr. Justice Stone stated in *Illinois Central Railroad Co.* v. *Crail, supra,* 281 U.S. at p. 63, 50 S.Ct. at p. 181, 74 L.Ed. 699: 'This contention ignores the basic principal underlying common law remedies that they shall afford only compensation for the injury suffered.'" (App. A-9)

The Court of Appeals similarly stated that "it is our view that A & P has failed to sustain its burden of proving that it suffered actual damage due to the delay in delivery" (Pet. 34).

The statute involved in this case is Section 20 (11) of the Interstate Commerce Act (49 U.S.C. Sec. 20 (11)), sometimes referred to as the Carmack Amendment. That section makes an initial carrier, such as the respondent Santa Fe here, "liable to the lawful holder [of the bill of lading] for the full actual loss, damage or injury to such property caused by it or by any [connecting carrier] * * *." Under the Carmack Amendment, it is no longer necessary to prove that the particular defendant railroad caused the loss proved by the shipper, but, as at common law, there is no right of recovery in the absence of loss. In the words of Mr. Justice Stone, speaking for the Court, the statute "gives only a right of recovery for 'actual loss.'" *Illinois Central Railroad Co.* v. *Crail,* 281 U.S. 57 (1930). Where no "actual loss, damage or injury" is proved, there is no liability. Congress has not provided for the payment to a shipper of any amount except as reimbursement for actual loss, damage or injury.*

QUESTION PRESENTED

We believe the question set out by A & P as being the question here is not appropriately stated. The question in this case, we submit, is as follows: Where the facts of the case show no loss, damage or injury to a shipper of a delayed shipment for sale at retail, is the shipper entitled to an award of damages in a suit against the initial carrier

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* A payment by a railroad to a shipper where no loss, damage or injury is shown, or any payment in excess of such loss, would be a rebate prohibited by Section 1 of the Elkins Act (49 USC Sec. 41(1)). *United States* v. *Wishnatzki,* 7 F. Supp. 313 (S.D.N.Y. 1934).

under Section 20 (11) of the Interstate Commerce Act (49 U.S.C. Sec. 20 (11))?

Under the caption "Question Presented," A & P submits a two and a half page discussion of the alleged facts of this case, intermingled with argument. Since the discussion is based on A & P's assumed facts which, as the lower courts found, were not proved in this case, the discussion is irrelevant to the issue here.

REASONS FOR DENYING THE WRIT

As noted above, the petition is predicated on the existence of a claimed factual situation that is not present in this case. No loss, damage or injury of any kind was shown, and there was no showing that the delay of this shipment had any effect on A & P's stores or on its customers. The trial court's findings of fact and conclusions have been reviewed and affirmed by a unanimous Court of Appeals. There is no conflict with any decision of this Court or of the Courts of Appeals. The petition for writ of certiorari should be denied.

Two cases regarding the effects of delay in transportation illustrate the principles involved. Where a shipper has proved actual damage by a delay, the railroad is liable but where, as here, the delay and a decline in wholesale prices during the delay are not shown to have damaged the shipper, there is no liability. In *New York P. & N. R. R. Co.* v. *Peninsula Produce Exchange of Maryland,* 240 U.S. 34 (1916), a decline in prices during the delay was shown to have reduced the amount received by the shipper and the award to him of the amount of the decline made him whole. However, where a dealer in wheat for export had not shown that the delay of certain shipments had caused him any loss, damage or injury, he was denied recovery although the wholesale prices of wheat had declined during the delay.

Craig v. *St. Louis-San Francisco Ry. Co.*, 242 Pac. 117, 243 Pac. 1050 (Kansas, 1926), certiorari denied 273 U.S. 714. Other decisions denying recovery where a delay, accompanied by decline in prices, has not been shown to have resulted in actual loss are referred to in the opinions of the District Court and the Court of Appeals in this case.

None of the cases claimed by A & P to have been in conflict with the decision below involved delays in transportation or delivery. In all of them the contents of the shipments had either been destroyed or physically damaged in the course of the transportation; actual losses had been incurred. The issues with which those cases were concerned are not present here.

In one of those cases a shipment of cattle was seriously injured in a train wreck. *New York, L. E. & W. R. Co.* v. *Estill,* 147 U.S. 591 (1893). In affirming the judgment for the plaintiffs, the Court noted that the trial court had given the following instruction to the jury:

> "The jury are instructed that plaintiffs are only entitled to recover in this case such damages as they have shown by the preponderance of the evidence were the natural and proximate consequence of the acts complained of in the petition, and that they are not entitled to recover any damages which could have been avoided or prevented by the plaintiffs by the exercise on their part of reasonable and proper care and prudence." (pp. 599-603)

In this A & P case, the plaintiff has shown no damage whatsoever as "the natural and proximate consequence of the acts complained of in the petition." As it had intended from the outset, it sold the shipment in its stores, where the price level remained stable. The decline in the wholesale market prices affected it not at all; and the claimed disruption of its operations, regarding the assertions in

its briefs about a scarcity or surplus of plums in its stores, was found not to have been proved.

In *Reider* v. *Thompson*, 197 F. 2d 158 (C.A. 5, 1952), cited by A & P as being in conflict with the decisions below, the plaintiff, seeking recovery for damage to sheepskins, showed that the sheepskins had been damaged and showed what the fair market value of the sheepskins would have been if they had been received from the carrier in good condition ($5,400). He then showed the percentage extent of their physical damage and also the dollar amount of their fair market value in their damaged condition ($2,700). He had presented a complete prima facie case showing both the fact of damage and the extent thereof and he was therefore held to have been entitled to have his case considered by the trial court on the merits. His evidence, of course, was subject to impeachment by the defendant, including a showing of how much the plaintiff had received on the sale of the sheepskins. The court made it clear that it would not approve a result which would award the plaintiff "more than indemnity." The plaintiff's case, however, had shown damage. Here the existence of damage to A & P was not shown; an award to it would have been a bonus rather than indemnity.

Both of the final two cases claimed by A & P to be in conflict with the decision here were ones where the shipper's commodities had been lost or destroyed in the course of their transportation by railroad. *Fort Worth and Denver Ry. Co.* v. *United States*, 242 F. 2d 702 (C.A. 5, 1957); *United States* v. *N. Y., N. H. & H. Ry. Co.*, 211 F. 2d 404 (C.A. 2, 1954). The fact of damage was clear and the judgments in favor of the shipper for the value of the lost or destroyed property at destination merely compensated it for its loss of the property. The shipments were made by the United States on government programs to aid the con-

signees. In one the recipient was to get the shipment at half price; in the other the recipient was to pay no price. These circumstances had nothing to do with the fact that the shipper's property had been lost or destroyed and the railroad was responsible for the loss. Moreover, the intended purpose of the shipments could not have been fulfilled except by other goods of the same value. The judgments simply indemnified the government. They afford no support to A & P's claim for an extra profit; its shipment had not been lost or damaged and it had used the plums by selling them in its retail stores without loss of profit. There is no conflict in the cases.

A & P's attempt to obtain arbitrary payments from the railroad whenever the price of produce on the separate wholesale market declines during a period of delay, despite the absence of any damage to A & P, is flatly opposed both to the provisions of the Carmack Amendment ("actual loss, damage or injury") and to the fundamental principles of the compensatory nature of damages. Like other shippers, A & P is entitled to damages only where the facts show that it has been damaged and only to the extent of compensation for the actual loss. There is no merit in its contention that it should be paid the amount of the wholesale price decline in any case of delay on the theory that if in some cases it really suffered a loss it would have difficulty in proving the loss. As the District Court stated, "I am not convinced by its arguments and am of the opinion that damages can be ascertained and proved by resort to retail prices and other means where actual damage occurs in a given case" (App. A-6). A & P's claim that it would have to trace each plum to its sale in order to show "with certitude" the existence and amount of damage is plainly incorrect. Even as to wholesale prices there is no certitude as to what price would have been received if the shipment

had been sold on that market, where wide variations of prices occur even on a single day (Stip. par. 5; Pet. 40). Reasonable proof of damage is all that is required, but A & P here sought to recover without any proof of damage.

The case here is entirely different from a situation where damage has been proved. That was the situation in the antitrust cases, cited by A & P, where losses in sales and profits were proved to have resulted from the defendants' violations of the Sherman Act and judgments for the plaintiffs in the trial courts were therefore sustained on appeal. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927). In the *Story Parchment* case, for example, the Court stated that "It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; • • •" (p. 562). In *Bigelow*, where the defendants had unlawfully prevented the plaintiff from showing first run movie films, the plaintiff showed the amount of its loss of receipts and the Court stated that "The evidence here was ample to support a just and reasonable inference that petitioners were damaged by respondents' action • • •" (p. 266). In *Eastman* the Court described the defendant's refusal to continue to sell its goods to the plaintiff at dealers' discounts and described the extensive evidence as to the resulting loss of profits. It noted that "The jury was instructed, in effect, that the amount of the damages could not be determined by mere speculation or guess, but must be based on evidence furnishing data from which the amount of the probable loss could be ascertained as a matter of reasonable inference" (p. 379). In the present case, in contrast, the facts showed that A & P was not damaged and that an award to it would have given it more money than it would have had if the shipment had not been delayed.

This case was decided—and properly so—on its particular facts, and the suppositious facts which are the subject of A & P's petition simply were not present here. No loss was shown to have resulted from this delay and the decision denying recovery in this case is in accord, rather than in conflict, with the decisions of this Court and of other courts. The District Court appropriately referred to a decision of the Privy Council where another shipper of a delayed shipment had sought to profit from a showing of decline in prices which had not affected him:

> "As Lord Atkinson said in denying plaintiff's claim in Wertime v. Chicoutime Pulp Co., L.R. (1911) A.C. 301, 308, that such a plaintiff seeks 'against all justice to be permitted to make a profit by breach of contract, by compensating for a loss he never suffered, and be put, so far as money can do it, not in the same position in which he would have been if the contract had been performed but in a much better position.'" (App. A-6)

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

OPINION OF THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., *Plaintiff,* v. **THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,** *Defendant.*	No. 57 C 745

January 6, 1964

CAMPBELL, Chief Judge.

This cause, a claim for damages by plaintiff, The Great Atlantic and Pacific Tea Company, Inc., against defendant, The Atchison, Topeka and Santa Fe Railway Company alleging unreasonable and unexcused delay in a shipment, having come on for trial upon a stipulation of facts, is presently before me upon the briefs of the parties.

The facts are as follows: Plaintiff Great Atlantic & Pacific Tea Company (hereinafter referred to as "A & P") is a New Jersey corporation engaged solely in the retail grocery business operating retail stores in which it sells fresh foods, vegetables and other items. Defendant, The Atchison, Topeka and Santa Fe Railway Company (hereinafter referred to as "Santa Fe"), is a corporation engaged in business in Illinois and other states as an interstate common carrier by railroad. Defendant is a "carrier" within the meaning of that word as used in the Interstate Commerce Act, as Amended, and was the initial carrier as

described in Section 20(11) of the Interstate Commerce Act, Title 49, U.S.C., Section 20(11) for the shipment of plums described below. This shipment was made under a uniform straight bill of lading issued by Santa Fe and signed by A & P and Santa Fe.

On June 2, 1956 a shipment was made by A & P consisting of a carload of California Beauty Plums from Red Banks, California consigned to A & P at Harlem River, New York, which is one of the receiving points of A & P for produce for the New York area. The plums were delivered to A & P by Santa Fe at 5:30 A.M. on June 12, 1956. Under the usual and customary time for transportation and delivery by railroad from Red Banks, California to Harlem River, New York, the plums should have been delivered to A & P prior to 9:00 A.M. on June 10, 1956. The period of delay was unreasonable and unexcused but was not intentional. The produce was not transported and delivered to A & P with "reasonable dispatch" within the meaning of that term in Section 2 of the "contract, terms and conditions" of the uniform straight bill of lading.

For the purpose of this lawsuit only Defendant concedes that if the plums had been sold on the wholesale market in New York on June 12, 1956 the price per crate would have been 74¢ per crate less than if such sale had been made on such wholesale market on June 11, 1956 (June 10, 1956 was a Sunday and therefore the wholesale market quotations for Monday, June 11, 1956 are used by the wholesale produce trade to determine the wholesale market prices for produce delivered on Sunday by a carrier). The plums were intended for sale and were sold at retail in A & P stores in the New York City area and were not sold at wholesale.

It is the practice of A & P to purchase produce from growers in the area where such produce is grown and to have it shipped to itself by common carrier in the area where the produce is to be sold in A & P retail stores. A & P orders produce from the growing area on the basis of the estimated need for such produce in the retail stores within 24 hours after the usual and customary shipping time for the retail store area from the growing area. Title to the contents of the shipment passes to A & P from the growers when the contents are loaded by the growers into the freight cars for shipment. These purchases and shipments are made by A & P for the purpose and with the intent of sale at retail in the A & P stores located in the respective destination areas. A & P does not sell on the wholesale market. Produce is not stored for future use by A & P in either warehouses or retail stores. A & P constantly moves the produce to the retail stores in time for sale in those stores on the day following its receipt by A & P from the carrier.

The practices described above were followed with respect to the shipment of plums herein.

In the New York metropolitan area, pursuant to instructions from A & P, there is a routine practice for the carrier delivering cars of produce to place such cars on the public inspection tracks for inspection by A & P personnel. Thereafter, when a car is accepted by A & P, an order is given to the carrier to move such car to an A & P private siding for unloading. Customarily such car is delivered to the A & P private siding on the day on which it is inspected and accepted by A & P personnel at the public inspection tracks. From 12 to 24 hours may elapse from the time such car is placed on the public inspection tracks until it is delivered to the A & P private siding. At times A & P will arrange for immediate unloading of such cars of produce to trucks at the public inspection tracks for direct delivery to retail

stores. On occasion A & P may issue diversion orders to move a car from the public inspection tracks to shipment to the city. On rare occasions A & P may allow a car to remain at the public inspection tracks after acceptance for a day or two before ordering the carrier to move the car to the A & P private siding. Cars are customarily unloaded by A & P promptly after they are delivered by the carrier to an A & P private siding. However, a car may remain at the A & P private siding from two hours to (on very rare occasions) 55 hours before it is released by A & P for return to the railroad.

A & P issues to all retail stores in the New York metropolitan area a daily price list which shows a retail selling price for each item of produce for that day. The price shown for plums on said A & P daily price list did not change during the period from June 10, 1956 to June 15, 1956. Each retail store manager has independent authority from A & P to determine whether produce should be offered for sale at prices lower than the prices shown in said price list and how often such prices should be reduced. Although the daily retail price lists for the entire month of June 1956 are not available, A & P concedes for purposes of this case that the prices quoted on such lists for plums of the kind and quality involved herein during the month of June, 1956 did not change as frequently as the wholesale market prices and did not move up or down in relation to changes in the wholesale market prices during that period. The wholesale market price of produce is considered as one of the several factors used by A & P in determining the retail prices to be included in the price lists described above.

A & P does not keep and to the knowledge of its officers and employees has never kept records which would disclose with respect to shipment of produce sold at retail (a) whether all of such produce has been sold, (b) the date or

time of day when such produce was sold, (c) the store at which such produce was sold, (d) whether such produce was commingled with other produce of the same kind or quality at some A & P retail stores, or (e) any facts about the sale of such produce, including the price at which it was sold other than the daily price list described above and advertisements, neither of which constitutes a record of actual sales.

There was no physical damage to or deterioration of the plums. A & P bases its claim for damages in this action solely on delay in the transportation and delivery of the plums and the decline in the wholesale market price during the period of such delay as set forth above.

Plaintiff points out that this case involves a head-on collision between the excuse of "injury without damage" and the axiom of "every wrong has a remedy." Broadly speaking, I would agree since the delay of two days is a wrong and yet there was no physical damage to or deterioration of the plums which were merely sold by A & P at identical retail prices on Wednesday instead of Monday.

Since plaintiff in this case cannot look to retail prices as a measurement of damages, as it concedes is the natural impulse, it instead bases its claim on a decline in wholesale prices during the critical period. The obvious difficulty with plaintiff's contention is that the wholesale market criterion of damages suggested in this case is, as plaintiff recognizes, unrealistic. Except for plaintiff's theory of replacement which I cannot accept in this case, I find no correlation between the stipulated facts of the wholesale market to justify this as measure of damages. A & P shipped its own plums intending them for sale and selling them at retail. The retail and wholesale market price levels move independently of each other. The wholesale prices on various kinds of plums of different quality and condition on Monday, June

11, 1956, consisted of 13 prices ranging from $3.77 to $7.60. It is not known how many crates sold at each price. The unweighted average was $4.93 per crate. On Tuesday, June 12, 1956, wholesale prices on various kinds of different quality and condition plums consisted of 30 prices ranging from $3.17 to $6.35, the unweighted average being $4.19, which accounts for the stipulated 74 cents decline in the wholesale market. I find that the wholesale market criterion suggested by plaintiff is, in this case, an illogical and improper measure of damages bearing no relationship to the facts. I find that the replacement value theory advanced by plaintiff is not applicable under the facts of this case since A & P did not purchase substitute plums in the New York wholesale market at the time when it should have received delivery of this shipment. Though A & P claims that it is impracticable to resort to retail prices to measure actual damages and cites various reasons, I am not convinced by its arguments and am of the opinion that damages can be ascertained and proved by resort to retail prices and other means where actual damage occurs in a given case. To apply this criterion in this case would result in an unjust enrichment to plaintiff. As Lord Atkinson said in denying plaintiff's claim in Wertime v. Chicoutime Pulp Co., L.R. (1911) A.C. 301, 308, that such a plaintiff seeks "against all justice to be permitted to make a profit by breach of contract, by compensating for a loss he never suffered, and be put, so far as money can do it, not in the same position in which he would have been if the contract had been performed but in a much better position." Also see U. S. v. Palmer & Parker Co., 1 Cir., 61 F.2d 455, 461; Pastor v. B. Lindner & Bro., 233 App. Div. 396, 253 N.Y.S. 184, 187. A & P states that it lost profits because of this delay. It states that "A & P did not have the plums when they were needed to satisfy the needs of its stores and therefore its customers. This we submit establishes fact of damage." At

another point it says "the inevitable result, therefore, was a scarcity of plums to satisfy customer demand on June 11. This scarcity was in no way relieved by the surplus which A & P had two days later as the result of the delayed delivery of the plums on top of those already ordered for delivery to meet A & P's needs at that time." It also states that "the real damage (loss of profits resulting from inability to sell at retail on June 11) cannot be proved * * *." These statements imply that A & P would have been able to sell these plums only on Monday, June 11, but was unable to do so when the plums actually arrived, thereby losing the anticipated profits. Since there was no physical damage to or deterioration of the plums and since the plums were sold at identical retail prices, the facts are to the contrary. Further, there is nothing in the record about the other California Beauty Plums sold by A & P in its New York City stores during the days in question except to the extent that it may be inferred from the fact that daily prices for such plums were issued by A & P, that others were being sold. A & P has not shown how many other cars of these plums it received during this period either at the Harlem River receiving point or at other New York warehouses in the New York Metropolitan Area. The evidence reveals that the plums in this shipment were sold on Wednesday rather than on Monday and that A & P's practice was to order from the growers in California at least eight days or more in advance on the basis of the advanced estimate of need in the stores within 24 hours after delivery. The evidence also reveals that A & P allows itself a leeway of flexibility in time of railroad delivery of produce. It does this by having the railroad place cars on public inspection tracks at destination prior to delivery on the A & P private siding and 12 to 24 hours may elapse before the final railroad move is made. The cars are available to A & P at that earlier placement and at times A & P takes the produce

from the cars at that point. Moreover, on rare occasions A & P may allow a car to remain at that earlier placement for a day or two before ordering the carrier to move it to the A & P private siding for unloading and release of the empty car. And on the siding A & P may allow the cars to wait from 2 to 55 hours before releasing the cars again to the railroad. Moreover, A & P diverts cars to other cities different from the original destination. With this built-in flexibility, there is no showing that A & P had fewer plums for sale in its stores on Monday than it had intended in advance or that it had more plums on Wednesday. Indeed, the fact that A & P did not find it necessary to purchase plums on the wholesale market to supply its stores for Monday, and to sell this shipment on that market as surplus, shows that there was no such rigidity of operations as A & P implies in its brief. Moreover, even if A & P sold a lesser quantity of plums on Monday than it had expected to sell, it suffered no loss by selling more plums on Wednesday instead of Monday at the same price level. From the facts before me, including the stipulated "usual practice" of plaintiff, I cannot assume, as plaintiff suggests, that A & P had no plums to satisfy customer demands on June 11th and that therefore A & P lost profits. For these reasons I find that A & P had failed to show a loss of profits.

Since this was an interstate shipment the Carmack Amendment, Title 49 U.S.C., Sec. 20(11) is applicable, which provides in part as follows:

> "• • • any such common carrier, railroad, or transportation company so receiving property for transportation • • • or any common carrier, railroad, or transportation company delivering said property • • • shall be liable to the lawful holder of (the bill of lading) • • • for the *full actual loss, damage, or injury* to such property caused by it or by any (connecting carrier) • • • notwithstanding any limitation of the amount

> of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; * * *" (49 U.S.C.A. § 20 (11)).

I find that A & P had shown no actual loss, damage or injury and therefore is not entitled to recovery under the Carmack Amendment. Illinois Central Railroad Co. v. Crail, 281 U.S. 57, 63, 50 S.Ct. 180, 74 L.Ed. 699. Neither is plaintiff entitled to recover under the traditional common law concept of damages for, as Mr. Justice Stone stated in Illinois Central Railroad Co. v. Crail, supra, 281 U.S. at p. 63, 50 S.Ct. at p. 181, 74 L.Ed. 699: "This contention ignores the basic principal underlying common law remedies that they shall afford only compensation for the injury suffered."

In U. S. v. Palmer & Parker Co., 61 F.2d 455, at pp. 459, 460, the court stated:

> "There is only one rule, of universal application, in such cases, and that is to give compensation for the loss suffered.
>
> " * * *
>
> "To repeat, the applicable rule is the actual loss, to the appellee, by the delay in delivery of this cargo of logs, for use in its business as a manufacturer and seller of mahogany veneers, etc."

In Craig v. St. Louis-San Francisco Railway Co., 120 Kan. 105, 242 P. 117, the court stated as follows:

> "For present purposes it may be said that an invasion of a legally protected interest imports injury, and injury is redressed by damages. Quantum of damages depends on extent of injury caused by the invasion. If nothing but the invasion appear, the injury is technical, and is compensated by nominal damages.

> To warrant substantial damages, there must be substantial injury. When substantial injury has been shown, the law concerns itself with expression of the idea of reparation in terms of money. • • •"

In C. L. Hils Co. v. Cincinnati, N. O. & T. P. Ry. Co., 42 Ohio App. 103, 181 N.E. 819, at p. 821, the court stated as follows:

> "Recovery of damages for delay in shipment must be limited to compensation for loss. Such damages are not to be identified as a penalty imposed upon the carrier for failure to deliver on time."

In Lorenzo Demase and Sam Manna, Partners Trading as Demase & Mann Company v. Pennsylvania Railroad Company, Court of Common Pleas of Allegheny County, Pennsylvania 1954, reported in 104 Pitts. Legal Journal 155, it is stated as follows:

> "It is fundamental that in an action for damages the plaintiff must show the breach or other wrong by defendant; he must show that he was damaged in consequence of the wrong; and finally, the extent of damage is determined by applying some accepted measure. Here, plaintiffs showed delay on the part of the defendant carrier, and they presented evidence of decline in market value, the usual measure of damages in shipment cases. We cannot apply a customary measure of damages unless the fact of damage is first demonstrated, as the measure is, after all, only an accepted guide to get at the dollars and cents amount of damage sustained. In this case, the plaintiffs seek to recover what they might have lost had they planned to sell each shipment on the day it arrived. However, the fact remains that they did not show any actual loss at all, for the reason that the tomatoes were first processed through the ripening plant, mingled with other shipments and repacked, and plaintiffs themselves made no attempt to trace the sale of the tomatoes in any particular shipment. Indeed, when the tomatoes were eventually sold sometime after their

> arrival date, plaintiffs may just as likely have realized a gain rather than a loss. To arbitrarily apply a measure of recovery whenever delay in transit occurs, without any showing of whether or not a loss was actually occasioned, would render the damages speculative and punitive, rather than compensatory."

In Lapidus v. Chicago, B. & Q. R. Co., D.C., 161 F.Supp. 664, at p. 667, Judge Knoch entered the following findings of fact and conclusions of law:

> "16. Plaintiffs proved that the Chicago wholesale market declined in an aggregate amount of $4,501.59 between the 6th and 7th mornings for perishables of the kinds that were carried in the 63 shipments. Plaintiffs did not prove that the perishables in the 63 shipments were comparable in quality and condition to those sold on the Chicago wholesale market, did not prove that they sold the perishables in the 63 shipments upon the declining markets between the 6th and 7th mornings, and did not prove that they suffered actual losses equivalent to the declines that the market experienced. • • •
>
> "5. Plaintiffs' proof of loss because of market declines on goods allegedly delayed was insufficient to carry their burden of proof on the issue of damages where they relied exclusively on market quotations to establish the fact of decline, but failed to link the market quotation declines to their own experience in selling on the declining market, and failed to correlate the quality and condition of their own goods to the quality and condition of the goods in the market quotations."

Judge Learned Hand, in Weirton Steel Co. v. Isbrandtsen-Moller Company, 126 F.2d 593 at pp. 594-595, stated as follows:

> "The ordinary rule is indeed that damages for injury to goods while in possession of a carrier are to be computed at the difference between the sound market

value at destination and the value as damaged. * * * That is obviously the right measure where the consignee buys the goods for resale which is the ordinary case; but at times it works out to give him more than indemnity, and when it does, the courts have refused to adopt it. * * *

"We have therefore no doubt that, if it affirmatively appeared that the Texas Company had sold the cans and their contents at no reduction, the libellant could recover only the reconditioning costs; it seems to us plain that any other rule would violate the fundamental principal that damages are only to provide indemnity. * * * On a record like this it is quite as possible as not that the Texas Company sold the whole consignment at the market price; in any case it alone had all the information on that subject * * * we know that all these cans were in fact sold, and it is entirely speculative to assume that they sold off price; and certainly it is impossible even to guess for how much off price. * * * "

In Missouri Pacific R. Co. v. H. Rouw Co., 258 F.2d 445 at p. 446 (1958), the court stated as follows quoting from American Jurisprudence, Damages, Section 13:

" 'The fundamental principle of the law of damages being compensation for the injury sustained, the plaintiff in a civil action for damages cannot * * * hold a defendant liable in damages for more than the actual loss which was inflicted by his wrong. * * * The law will not put him in a better position than he would be in had the wrong not been done or the contract not been broken.' "

I am asked in this case to apply a measure of damages which has, in my opinion, no logical relationship to the stipulated facts and which is indefinite and uncertain. From the facts in evidence I cannot thus depart from accepted traditional principles of the law of damages. Accordingly, I find the issues for the defendant and the cause is dismissed at plaintiff's costs.